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WOMEN AND LEGAL HIERARCHY

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Catharine MacKinnon mentioned that there were a number of conditions which would have to be met before feminism in legal education had been achieved. She mentioned, for example, the representation of women's point of view, proportionality between male and female professors and between female and male secretaries. I am not very optimistic about the achievement of those conditions. I am not hopeful because I believe that the idea of feminism and law is an oxymoron. Women's association with affectivity and desire prevents our acceptance as equals within the academy which is perceived as the quintessential locus of reason. Australian legal education has accepted this assignation of men and women to separate spheres and, even though the proportion of women students is now around 50 per cent, which is indeed characteristic of legal education throughout the English-speaking world, I think that this has made relatively little difference, either in terms of substance or process.

We have no Department of Women's Law as we find at the University of Oslo, for example. In the late 1960s and early 1970s we had the appearance of welfare law, poverty law, discrimination law and so on, which allows some small space in terms of substance for the consideration of women's and feminist issues. However, when we look at courses which specifically address feminist issues, such as the course in Law and Gender which Regina Graycar developed at the University of NSW, they are perceived to be very threatening by colleagues. In addition, the preferred pedagogy in most law schools is one which comports with legal positivism. That is, it is narrow, doctrinal, atheoretical and acontextual and is committed to producing lawyers trained for professional practice and who have been thoroughly inculcated with a sense of the appropriateness of homogeneity, hierarchy and technical competence. We also find a disproportionate focus on abstract questions of law in appellate decision-making. This method operates as an effective means of transmitting lawyerly values. Dealing with the issues at a high level of abstraction also means that questions of law become blanched of questions relating to substance. Hence, an issue dealing with a discriminatory harm, for example, completely disappears once it is transmuted into an issue of constitutionality at a high level.

Both the pedagogical substance and the method reinforce the idea that those values associated with maleness are normative. So if we look at the substance of constitutional law, commercial law, criminal law and so on, women are invisible in other than a range of crippling stereotypes or are confined to marginality via a textbook footnote. That position is the same here as it is in the United States. Similarly, the aggressive and competitive classroom style of law schools mirrors the hierarchical, amoral and adversarial style of the court. This anti-humanistic, male-oriented universe is one which is deeply repugnant to a feminist vision of what a law school should be like.

Even at law schools such as my own, Macquarie, which have eschewed the lecture method with a god professor on

high, lording it over his students (the sex monopoly, of course, is rare), and has steadfastly maintained informal small group teaching for all classes, students still acquire the messages indelibly associated with the male-oriented adversarial system. Similarly, while Macquarie generally favours a more contextualised approach to the study of law, it has not been sympathetic to a feminist perspective. Men of the left and critical legal scholars have banished women to the periphery almost as readily as the traditionalists.

Small changes in method cannot transmogrify the law school and thereby instantaneously realise a feminist vision of it because the gender system lies at the heart of Western society. My colleague in Sociology, Bob Connell, uses the term "hegemonic masculinity" to describe the gender order in which we live and, borrowing from Gramsci, he defines hegemonic masculinity as "a social ascendancy achieved in a play of social force that extends beyond contests of brute power into the organisation of private life and cultural processes."² In accordance with the Gramscian thesis, neither force nor total cultural dominance are essential, for different patterns can emerge within the overall paradigm of dominance. Indeed, some diversity is essential to maintain that hegemony, for an uncompromising display of brute force may encourage counter-hegemonic and insurrectionist conduct on the part of the oppressed. Thus, the appointment of the occasional dissentient feminist law teacher, the creation of a feminist legal theory course and the inclusion of a feminist session at a law conference, dare I say, all serve to mask the nature of male dominance.

The law itself, of course, is a significant hegemonic mechanism. It cannot afford to appear to be anything other than just and fair in order to maintain its ideological role in society.³ The legal language of abstraction and universalism is a primary vehicle for reproducing male dominance. When we endeavour to put flesh on the dry bones of this language, we see that the favoured abstractions denote male standards which deny the particularity of femaleness and women's experience. Hence, "the professor" is always male. So is "the lawyer" and "the judge", so that the positions are created and perceived in male terms even when occupied by a woman. The notion of the professor, or the lawyer, or the judge as woman has no real substance except as an "other". "Otherness" is a fundamental category of human thought. I think that is one of the most important insights proffered by Simone de Beauvoir. So I ask, how can women, who are hermetically sealed within a carapace of otherness, imagine that the power brokers and decision-makers within the hierarchic, sex-riven universe of the law school are ever going to release them when it might be to the detriment of men?

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^[1] I have developed some of the ideas in this comment more fully in another article. See Thornton, *Hegemonic Masculinity and the Academy* (1989) 17 *Int'l J Soc of Law* (forthcoming).

^[2] RW Connell, *Gender and Power* (Sydney: Allen & Unwin, 1987) at 184.

^[3] EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (London: Allen & Lane, 1975) at 263.
